Supreme Court, U.S.
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No. 92-1516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MAGNESIUM ELEKTRON, INC.,
Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., and FRIENDS OF THE EARTH, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., AND FRIENDS OF THE EARTH, INC., IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Third Circuit erred in affirming, without opinion, the determination of the district court that respondents have standing.

PARTIES TO THE PROCEEDINGS

Respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth, Inc., are non-profit environmental organizations. Neither corporation has any parent or subsidiary corporations.

Petitioner Magnesium Elektron, Inc., is a wholly-owned subsidiary of British Alcan Overseas Investments, Limited, and an indirect, wholly-owned subsidiary of Alcan Aluminium Limited of Canada.

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Respondents, Public Interest Research Group of New Jersey, Inc. ("NJPIRG"), and Friends of the Earth, Inc. ("FOE"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Judgment Order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

On January 23, 1992, the District Court for the District of New Jersey issued its Opinion granting respondents' motions for a declaratory judgment that they have standing to maintain this action, for partial summary judgment as to liability, and for permanent injunctive relief. Pet. App. A3-A29. The district court implemented the decision by issuing an Order on February 28, 1992. Pet. App. A30-A31.

On December 15, 1992, the Court of Appeals for the Third Circuit issued a Judgment Order summarily affirming the decision of the district court. Pet. App. A1-A2. On January 8, 1993, the court of appeals issued an Order denying petitioner's motion for rehearing. Pet. App. A32-A33.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in the petition (Pet. 3-4), the following portion of Section 505 of the Clean Water Act, 33 U.S.C. 1365(g), is relevant:

> (g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

STATEMENT OF THE CASE

This is a citizens' suit under Section 505 of the Clean Water Act, 33 U.S.C. 1365, which sought injunctive relief and civil penalties for petitioner's violations of its National Pollutant Discharge Elimination System ("NPDES") permit for the discharge of pollutants over a period of five and one-half years.

In the district court, respondents filed motions for a declaratory judgment that they have standing to maintain this action, for partial summary judgment as to liability, and for permanent injunctive relief.

The record below shows that petitioner discharged excessive levels of total organic carbon ("TOC"), total dissolved solids ("TDS"), sodium, and oil in violation of the discharge limitations in its permit, exceeded the temperature limitation, and violated the monitoring and reporting requirements on numerous occasions (J.A. 181-188).[1] Petitioner discharges into Wickecheoke Creek, which flows into both the Delaware and Raritan Canal and the Delaware River at Prallsville, New Jersey (J.A. 114-115). Wickecheoke Creek downstream from Green Sergeants Covered Bridge is used primarily for recreational purposes, including fishing and hiking (J.A. 115). The Creek is the largest of 24 tributary streams which feed into the Delaware and Raritan Canal (J.A. 115-116).

Most of the Canal and its adjacent areas are part of the Delaware and Raritan Canal State Park (J.A. 115). Adjacent to the Creek and Canal is the Prallsville Mills Historic District, which contains historic buildings, some of which are used for exhibits, concerts, and community events (*ibid.*). The Canal is used for recreational fishing of numerous species of fish (J.A. 116). The Canal is also a source of drinking water for approximately 1,000,000 people living in the central portion of New Jersey (*ibid.*). The New Jersey Water Supply Authority draws water from the Canal in order to provide potable water to North Brunswick

[1] "J.A." refers to the Joint Appendix filed by the parties in the court of appeals.

Township, Elizabethtown, East Brunswick Township, Middlesex, and the City of New Brunswick (*ibid.*).

The Delaware River and its surrounding areas are used heavily for fishing and other recreational uses (J.A. 435). The River's ecosystem is an important nesting and feeding habitat for many species of fish and birds (*ibid.*). Like the Canal, the Delaware River below Prallsville is a major source of drinking water for residents of both New Jersey and Pennsylvania, including those who live in Trenton and Philadelphia (*ibid.*).

The record below shows that members of NJPIRG and FOE have health, recreational, aesthetic, and environmental interests in the Delaware and Raritan Canal and the Delaware River downstream from petitioner's discharge point (J.A. 415-427). Chaim and Elaine Gold, who are members of FOE, live in Trenton on the strip of land running between the Canal and River (J.A. 418, 422). They own their home, which is located just 200 yards west of the Canal and 200 yards east of the River downstream from the confluence of Wickecheoke Creek and the Canal and River (*ibid.*). The water intakes for their municipal drinking water supply are located in the River 300 yards downstream from their home (J.A. 419). Because Mr. Gold has high blood pressure and is restricted to a salt-free diet, high levels of sodium in his drinking water could seriously affect his health (*ibid.*). Mr. and Mrs. Gold enjoy boating, fishing, water skiing, and swimming along the River between Trenton and Philadelphia (J.A. 418, 422). They also enjoy hiking along the Canal and River in Washington Crossing State Park, which is downstream from the confluence of Wickecheoke Creek and the Canal and River (J.A. 418-419,

422-423). Mr. Gold's psoriasis is aggravated by swimming in polluted waters (J.A. 420). Mr. and Mrs. Gold rely on information about the amount of pollution in the Canal and River in order to decide whether to eat fish caught there (J.A. 420, 423).

Julie Howat, a member of FOE, lives in a northern suburb of Trenton (J.A. 425). Her house is located approximately one mile from the Delaware and Raritan Canal and the Delaware River downstream from the confluence of Wickecheoke Creek and the Canal and River (*ibid.*). Like Mr. and Mrs. Gold, her drinking water supply is taken from the River downstream from petitioner's discharge point (J.A. 419). She enjoys walking, picnicking, and studying nature in the area adjacent to Washington Crossing State Park (J.A. 425). She avoids eating fish caught in the Canal or River because she is afraid of contamination from harmful pollutants but would eat the fish if the waters were cleaner (J.A. 426).

Sandra Silverstone, a member of both NJPIRG and FOE, enjoys walking, hiking, and studying nature along the Delaware and Raritan Canal and the Delaware River between Frenchtown and Lambertville, which are downstream of the confluence of Wickecheoke Creek and the Canal and River, with her husband and two children (J.A. 415). She also enjoys sightseeing along the Canal and River and visiting the towns and historic sites in the area (*ibid.*). She avoids eating fish caught in the Canal or River because she is concerned that it is not safe to do so but would eat the fish if the waters were cleaner (J.A. 415-416).

Respondents also presented evidence from United States Environmental Protection Agency ("EPA")

documents which set forth the harm caused by the pollutants which petitioner has illegally discharged. For example, TOC "is composed of a variety of organic compounds in various oxidation states." *Standard Methods for the Examination of Water and Wastewater*, section 5310 (17th ed. 1989) (J.A. 402). "Some of these carbon compounds can be oxidized further by biological or chemical processes" (J.A. 402). The process of oxidation depletes the amount of dissolved oxygen in the water. Fish cannot survive without sufficient quantities of dissolved oxygen. EPA, *Quality Criteria for Water* (1976)(hereafter "*QCW* (1976)") (J.A. 296-297). EPA states: "Since fish and other aquatic life depend on oxygen for life, the oxygen-demanding wastes must be controlled, or the fish die." EPA, *Primer for Wastewater Treatment* (1980) (J.A. 341). Furthermore, severely low levels of dissolved oxygen "can adversely affect aquatic insects and other animals upon which fish feed." *QCW* (1976) (J.A. 298).

EPA states that dissolved oxygen "generally has been considered as significant in the protection of aesthetic qualities of water as well as for the maintenance of fish and other aquatic life." *QCW* (1976) (J.A. 295). "Dissolved oxygen concentrations are an important gauge of existing water quality and the ability of a water body to support a well balanced aquatic fauna" (*ibid.*). "The aesthetic qualities of water require sufficient dissolved oxygen present to avoid the onset of septic conditions with its attendant malodorous emissions." (*ibid.*).

The record contains evidence showing that in 1990 the New Jersey Department of Environmental Protection and Energy ("NJDEPE") evaluated Wicke-

cheoke Creek, into which petitioner directly discharges, as "moderately degraded * * * because of wastewater discharges" (J.A. 606). NJDEPE noted that "[a]n intensive study on [the Creek's] macroinvertebrate community has found a shift from forms normally present in cold water streams to species tolerant of extremely saline conditions" (J.A. 605).

The record below also shows that the interests of the respondent organizations have been harmed by petitioner's violations of the monitoring and reporting requirements of its permit (J.A. 428-435, 538-541). The record includes affidavits of officials of the respondent organizations showing that they rely on companies to correctly monitor their discharge and report the results to government agencies, where respondents can view the reports (J.A. 428-430, 538-540). This information is essential to respondents' research regarding compliance with water pollution control laws and efforts to protect and improve the quality of the waters, including bringing citizen enforcement suits (J.A. 429-431, 538-540).

The district court examined each of the requirements for standing and concluded that respondents had established their standing as a matter of law. Pet. App. A8-A16. The district court also granted respondents' motion for partial summary judgment as to liability for 27 violations of the TOC discharge limitation in petitioner's permit and granted respondents' motion for permanent injunctive relief to prevent future violations of the permit. Pet. App. A22, A29. Petitioner had previously stipulated to liability for an additional 123 violations of the discharge limitations and monitoring and reporting requirements of its permit. Pet. App. A7-A8. The district

court ordered the case to proceed to trial on the issue of the amount of civil penalties to be assessed against petitioner for its 150 violations of the Act.[2]

In imposing the injunction, the district court found that respondents had "establish[ed] harm to aquatic life and the public health when the aforementioned substances are discharged at levels in excess of [petitioner's] permit limitations." Pet. App. A26. The district court rejected petitioner's argument that respondents had not shown actual injury to the environment, finding that "this argument is directly contradicted by the [NJDEPE] report which found changes in the Creek which affected fish and other aquatic life." Pet. App. A27. The district court found that "there is a likelihood of irreparable injury if MEI [petitioner] is likely to resume discharging its effluent into the waterways" and concluded that "MEI is likely to resume discharging its effluents unless a permanent injunction is issued." Pet. App. A27-A28.

The Court of Appeals, after hearing oral argument, issued a Judgment Order summarily affirming the judgment of the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Fails to Demonstrate Any Conflict between the Decision Below and Any Decision of This Court or Any Court of Appeals

Petitioner argues (Pet. 17):

> This case was evaluated under a lower threshold for standing than this Court's decision in *Lujan II* [*Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992)], and thus

[2] Trial is currently scheduled for November 1, 1993.

> there is a fundamental conflict between this Court's holding as to what is required for Article III standing and the position of the Third Circuit Court of Appeals.

However, the Court of Appeals for the Third Circuit did not issue an opinion. Instead, the court issued a summary affirmance in the form of a Judgment Order. Since the court of appeals issued no opinion, there can be no conflict with this Court or any other court of appeals. Because the court of appeals did not issue an opinion, the petitioner is, in effect, asking this Court to review the opinion issued by the district court. Respondents demonstrate below that there is no conflict between the district court opinion and any decision of this Court or any court of appeals.

2. The Decision of the District Court Is Consistent with the Decisions of This Court and of the Courts of Appeals

The district court's decision relies upon and applies the requirements for Article III standing—injury, causation, and redressability—set forth in *PIRG of NJ v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 70-73 (3d Cir. 1990), certiorari denied, 111 S. Ct. 1018 (1991). Pet. App. A9.

In *Powell Duffryn*, *supra*, 913 F.2d at 70, the court of appeals described the requirements for standing by quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982), in which this Court summarized its earlier precedents:

> [A]t an irreducible minimum, Art. III requires the party who invokes the Court's authority to "show [1] that he personally has

> suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," * * * and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision * * *."

This Court reiterated the identical standing requirements in *Defenders of Wildlife*, *supra*, 112 S. Ct. at 2136.[3]

The district court found that respondents had satisfied each of the three requirements for standing. First, the district court found that respondents had produced affidavits of their members and reports by federal and state environmental protection agencies which demonstrate injury to the interests of their members. Pet. App. A10-A11. The district court also "conclude[d] that plaintiffs ha[d] demonstrated that they [we]re injured by MEI's failure to monitor and report as required by the Act." Pet. App. A12.

Second, the district court analyzed the *Valley Forge* requirement of causation by applying the three-part test for traceability in Clean Water Act cases set forth in *Powell Duffryn* (Pet. App. A13; 913 F.2d at 72):

> 1) the defendant has discharged some pollutant in concentrations greater than allowed by its permit;
>
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and

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[3] The district court did not discuss *Defenders of Wildlife* because it had not yet been decided. However, the decision was fully argued in the court of appeals.

> 3) that this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Relying on *Powell Duffryn*, the district court found (Pet. App. A13) that the second prong of the *Valley Forge* test "does not require plaintiffs to show 'to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs.' " 913 F.2d at 72. The district court quoted *Powell Duffryn*, 913 F.2d at 72, which in turn quotes *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n. 20 (1978), for the proposition that plaintiffs "need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiff's harm." Pet. App. A13.

Third, the district court concluded: "As in *Powell*, the rights of PIRG and FOE members will be redressed by a favorable decision, which would force MEI to comply with its permit." Pet. App. A15.

The district court's decision is also in full accord with the decisions of the courts of appeals which have considered the standing of citizen-plaintiffs under the Clean Water Act. See, *e.g.*, *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 979 (4th Cir. 1992); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1112-1113, n. 3 (4th Cir. 1988), certiorari denied, 491 U.S. 904 (1989); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984). For example, in *Simkins*, *supra*, 847 F.2d at 1112, n. 3, plaintiff established standing by showing that one of its members hiked along the river and had been "adversely affected physically, aesthet-

ically and emotionally by [defendant's] failure to comply with its NPDES *permit and resulting illegal* pollution." In *Consolidated Rail, supra*, 768 F.2d at 61, plaintiffs established standing by showing that their members picnicked along the river, fished and swam in the river, travelled near the river, and found the pollution offensive.

Petitioner contends that "Respondents' affiants did not and could not allege a particularized injury since MEI's effluent is incapable of harming Respondents or the environment." Pet. 19. However, respondents submitted evidence showing that the types of pollutants which petitioner discharged in excess of its permit limits have been specifically recognized as harmful to public health and aquatic life by EPA (J.A. 279-329, 353-387).

Petitioner does not contest any of the scientific evidence presented by respondents. Instead, petitioner claims (Pet. 19):

> [T]he affiants do not establish *how* any of their activities are affected by MEI's effluent or the violations. Each of the affiants allege only generalized and generic environmental concerns and fears regarding the River and Canal. Therefore, Respondents have failed to allege any concrete or particularized injury as required by this Court. [emphasis in original]

However, the record shows that the health interests of Chaim Gold, Elaine Gold, and Julie Howat have been harmed by petitioner's illegal discharges of TDS, consisting primarily of salts, because their drinking water is taken from the Delaware River downstream

from petitioner's discharge point (J.A. 419). Excess TDS in drinking water has harmful effects on health because it has laxative effects and adverse effects on patients afflicted with cardiac disease and on women with toxemia associated with pregnancy (J.A. 301, 359). TDS has especially serious effects on people like Mr. Gold who have high blood pressure and are supposed to reduce or eliminate their salt intake (J.A. 301, 359, 419). Mr. Gold's psoriasis is negatively affected by petitioner's discharge of pollutants, such as oil, because he swims in the Delaware River and pollution exacerbates his skin condition (J.A. 420). Excess TOC reduces the availability of dissolved oxygen, creating unpleasant odors (J.A. 295, 402). The affiants' enjoyment of walking, hiking, swimming, boating, fishing, studying nature, and sightseeing in, on, or near the Canal and River downstream of petitioner's discharges are therefore diminished (J.A. 415, 418-419, 422-423, 425). TOC, TDS, oil, and excessive temperature have harmful effects on fish and other aquatic life (J.A. 279-329, 353-387). Two affiants do not eat fish caught in the Canal or River because of the excessive levels of pollutants in those waters to which petitioner has contributed (J.A. 416, 426).

Petitioner's contention that its discharges are incapable of causing harm is also contradicted by the New Jersey 1990 State Water Quality Inventory Report, which describes the water quality and environmental condition of the State's waterways (J.A. 602). The NJDEPE report includes the following assessment of Wickecheoke Creek, into which petitioner directly discharges (J.A. 605):

> Wickecheoke Creek * * * a cold water fishery, is evaluated as moderately degraded. An

> intensive study on this latter stream's macroinvertebrate community has found a shift from forms normally present in cold water streams to species tolerant of extremely saline conditions.

The NJDEPE report goes on to state: "Wickecheoke Creek * * * is considered to have a moderately degraded fisheries, (i.e. partially meeting this designated use), because of wastewater discharges" (J.A. 606).

The area where petitioner discharges its wastewater is a fresh-water ecosystem (J.A. 603). Petitioner's discharge of wastewater high in TDS consisting primarily of salts contributes to the artificially saline condition of Wickecheoke Creek, which in turn affects the aquatic life of the Creek (J.A. 131). Moreover, the saline condition of the Creek affects the condition of the Delaware and Raritan Canal and the Delaware River since the Creek flows into both the Canal and the River (J.A. 115). Petitioner's discharges cause the transformation of a naturally fresh-water environment into an artificially salt-water environment (J.A. 603, 605). Petitioner's own expert admitted that this transformation causes fresh-water organisms to die off and allows salt-water organisms to become dominant (J.A. 409-413).

Petitioner claims "[t]he majority of the excursions at issue in this case * * * relate to natural environmental conditions and phenomena, or measurement anomalies." Pet. 12. Conspicuously absent from petitioner's argument is any evidence in the record to support these assertions. For example, petitioner claims, without evidentiary support, that its temperature violations "resulted from the heating of the

effluent by the sun" (*ibid.*) and that petitioner's wastewater "entered the Creek at essentially the same temperature as that of the Creek" (Pet. 13). Petitioner claims, again without evidentiary support, that its "TOC violations were a function of the natural consequences of migratory geese inhabiting the ponds, and measurement anomalies," rather than from its manufacturing process, and that these forms of organic carbon create oxygen rather than deplete dissolved oxygen in water. *Ibid.*

Petitioner's contention that its illegally high discharges of pollutants are incapable of causing harm is essentially an improper attempt to challenge the validity of the terms of its discharge permit. However, Section 509(b)(2) of the Clean Water Act, 33 U.S.C. 1369(b)(2), provides that a permit "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." In enacting this section, Congress intended to preclude untimely challenges to permit requirements in enforcement proceedings. As the Senate Report states (S. Rep. No. 414, 92d Cong., 1st Sess. 79-80 (1971)):[4]

> An alleged violation of an effluent control limitation or standard would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision.

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[4] Reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, 93rd Cong., 1st Sess., vol. 2, pp. 1497-1498 (1973), 1972 U.S. Code Cong. & Ad. News 3675.

* * *

> Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.

Petitioner also contends that "the alleged injuries are not redressed as a result of the decision, but are exacerbated because 100% of MEI's effluent is discharged into the Delaware River * * *." Pet. 18. As a result of the injunction issued by the district court, petitioner is disposing of its wastewater by hauling it to the wastewater treatment plant of the Trenton Sewer Authority for discharge into the Delaware River at the southern edge of Trenton (J.A. 129-130). Under the Clean Water Act, the Trenton plant can discharge only in compliance with its NPDES permit. 33 U.S.C. 1311(a). There is no evidence in the record which indicates that the Trenton plant is not complying with the discharge limits of its permit. Moreover, petitioner's hauling of its wastewater to Trenton alleviates the harm caused by petitioner's discharge of pollution to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River upstream of Trenton. The harm to respondents' members resulting from their use of the waters and nearby areas upstream of Trenton has therefore clearly been redressed by this injunction.

* * *

Thus, the district court correctly followed the well-established law of this Court. Petitioner points to no specific holdings of the district court which are in conflict with any decisions of this Court or any court

of appeals. Instead, petitioner disputes the application of those legal principles to the facts of this case. The application of correct principles of law by a district court to a particular factual situation does not raise issues for review by this Court.

CONCLUSION

For the foregoing reasons, respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth, Inc., submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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